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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| CARLOS AVELAR,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SEVEN FIFTY-FOUR, INC. et al.,<br><br>Defendants and Appellants. | E059862<br><br>(Super.Ct.No. RIC1305222)<br><br>**OPINION** |

APPEAL from the Superior Court of Riverside County. Daniel A. Ottolia, Judge. Reversed and remanded with directions.

Garrett & Tully, Efren A. Compéan, and Trang T. Tran for Defendants and Appellants.

Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez and Alejandro P. Gutierrez; Law Office of Robert W. Skripko, Jr. and Robert W. Skripko, Jr., for Plaintiff and Respondent.

Plaintiff Carlos Avelar used to work as a waiter at an International House of Pancakes (IHOP) restaurant owned and operated by defendant Seven Fifty-Four, Inc. (IHOP 754).

In this action, Avelar alleges that IHOP 754[1] violated state labor laws. He asserts various causes of action individually, on behalf of a class, and as the representative of other employees pursuant to the Labor Code Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.).

IHOP 754 moved to compel arbitration, based on a one-page arbitration agreement signed by Avelar. In opposition, Avelar testified, among other things, that IHOP 754 never gave him an opportunity to read the arbitration agreement, and that he understood that he had to sign it to keep his job. The trial court refused to enforce the arbitration agreement, ruling that it was both procedurally and substantively unconscionable.

IHOP 754 appeals. We will reverse. While we agree that the arbitration agreement was procedurally unconscionable, we cannot agree that it was substantively unconscionable. Accordingly, Avelar can be required to arbitrate all of his claims, with the sole exception of his PAGA claim.

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[1] Karen Miles, the president of IHOP 754, was also named as a defendant. Avelar's complaint alleges that IHOP 754 and Miles are alter egos and, in general, treats them as interchangeable. Significantly, Avelar has never argued that Miles is not entitled to enforce the arbitration agreement at issue in this appeal. (See generally *Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 837-840 [certain nonparties, including agents, can enforce arbitration agreements].) Accordingly, this and further references to IHOP 754 also include Miles, except when the context otherwise requires.

I

FACTUAL BACKGROUND

The following facts are taken from the declarations and exhibits submitted in connection with the petition to compel arbitration. Each side raised objections to the other side's evidence. The trial court, however, overruled all such objections. In this appeal, the parties have not argued that this was error. We deem any such argument forfeited. Hence, we may consider all of the evidence. (See *Doe v. California Lutheran High School Assn.* (2009) 170 Cal.App.4th 828, 831 [Fourth Dist., Div. Two].)

A. *The Arbitration Agreement.*

IHOP 754 operated an International House of Pancakes restaurant in Riverside. Avelar worked for IHOP 754 as a waiter from June 2010 through December 2012.

It is undisputed that, on or about March 30, 2012, both Avelar and IHOP 754 signed a document entitled "Agreement to Arbitrate Employment Disputes" (Arbitration Agreement). (Capitalization altered.) The Arbitration Agreement was a one-page preprinted form. It provided, as relevant here:

"Ihop #754 and this employee hereby agree that any controversy, dispute, or claim arising out of or relating to employee's employment with Ihop #754 will first attempt to settle [*sic*] through good faith negotiation. If the dispute cannot be settled through negotiation, arbitration will be administered by the American Arbitration Association pursuant to its Employment Arbitration Rules and Procedures and subject to its policies on employment arbitration minimum standards for procedural fairness. . . . [¶] . . .

"1. INITIATION OF ARBITRATION: Once either party determines that efforts at good faith negotiation have failed, within 60 days of notifying the other party of this determination, either party may initiate arbitration proceedings . . . .

"2. FEES AND COSTS OF ARBITRATION: Ihop #754 agrees to pay all arbitration forum fees and all fees and expenses charged or incurred by the arbitrator. Each party will bear their own attorney's fees and costs.

"3. ARBITRATOR SELECTION: . . . A neutral arbitrator will be selected according to the normal rules and procedures of the American Arbitration Association (which can be downloaded from the AAA website; at your request, the company will provide you with a copy of the AAA's rules and procedures).

"4. DISCOVERY: The arbitrator will determine the appropriate scope of discovery as governed by the normal rules and procedures of the American Arbitration Association, and will [*sic*] in any case be sufficient to permit each party to fully investigate and present its claims and defenses. [¶] . . . [¶] . . .

"7. GOVERNING LAW, SEVERANCE, . . . MODIFICATION . . . : The terms of this Agreement shall be gover[ne]d by the laws of the state of California. If any provision of this Agreement is adjudged to be void or otherwise unenforceable, in whole or in part, such adjudication shall not affect the validity of the remainder of the Agreement. . . . This Agreement can be modified or revoked only by a writing signed by employee and an executive officer of Ihop #754 that references this Agreement and specifically states the intent to modify or revoke this Agreement.

"8. VOLUNTARY AGREEMENT: Employee, by signing below, acknowledges that employee enters into this Agreement freely and voluntarily, and without coercion, in consideration for new or continued employment provided by Ihop #754."

B. *Avelar's Testimony*.

According to Avelar, one day in the spring of 2012, while he was at work and taking care of customers, his supervisor, Cesar Hernandez, handed him a piece of paper and said, "You have to sign this for work." Avelar — having previously seen his supervisor fire employees when they did not follow his orders immediately — believed he would be fired if he did not sign.

As Avelar signed the paper, his supervisor stood over him, with his hand out to receive it. Avelar was not given any time to read it. He was never given a copy of it. No one from IHOP 754 ever told him, either before or after he signed the paper, what the paper was.

At the time, Avelar did not know what arbitration was. He had no idea that, by signing the paper, he could be giving up the right to discovery, the right to a jury trial, and the right to appeal.

Avelar saw his supervisor similarly go up to other employees in the kitchen and dining areas, hand them a piece of paper, and stand over them while they signed it.

When Avelar first saw the Arbitration Agreement (as an exhibit to the petition to compel arbitration), it looked like the paper his supervisor had made him sign. The signature appeared to be his signature.

C. *Miles's Testimony*.

Miles was the president of IHOP 754. She testified that, in October 2011, she held a meeting for all employees of IHOP 754. At that meeting, she provided all attendees with a previous version of the Arbitration Agreement. She explained what it was. She also explained that signing it "was not a requirement of continued employment." On November 1, 2011, Avelar signed the previous version.

In 2013, IHOP 754 decided to revise the arbitration agreement. On March 1, 2012, at Miles's direction, a notice was posted in the employees' lounge. It stated:

"For those of you who have signed an Arbitration Agreement with us we are replacing that agreement with a new, shorter, more employee favorable agreement.

"Again, as before, this is not a requirement of employment and you may or may not sign it. Every General Manager will have the new form and will be handing them [*sic*] out to every employee.

"Please read the agreement before you sign it and then return it to your General Manager. As with all forms that you sign copies are available if you wish. Just ask your General Manager and they will make a copy of it for you."

Thereafter, Miles gave Hernandez copies of the new arbitration agreement. She told him to provide it to all employees, to tell them they had one week to review it, and to "reiterate" to them "that the execution of the Arbitration Agreement was not required to maintain employment."

Hernandez's workday usually ended at 4:00 or 4:30 p.m., whereas Avelar's shift usually started around 5:00 p.m. Thus, it was "highly unlikely" that they were at work at the same time.

By the time of the motion to compel arbitration, Hernandez no longer worked for IHOP 754.

## II

## PROCEDURAL BACKGROUND

Avelar filed this action as a putative class action. In the operative complaint, he asserted causes of action for failure to pay minimum wage, failure to pay overtime, failure to provide accurate wage statements, failure to provide rest and meal periods, failure to reimburse expenses for uniforms, violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.), and penalties under PAGA.

IHOP 754 filed a petition to compel arbitration. Avelar filed an opposition, in which he argued, among other things, that the arbitration agreement was unconscionable, that any arbitration should include his class claims, and that his PAGA claim was not subject to arbitration.

After hearing argument, the trial court denied the petition. It explained:

"Unconscionability is made up of procedural and substantive elements.

"[P]laintiff declares that his boss, . . . Hernandez, presented the arbitration agreement to him during plaintiff's shift while he was tending to customers. He declares that he had no time to read it, that Hernandez stood over him with his hand out while he

signed it. Plaintiff declares that he was never told . . . what the papers were about. He believed . . . based on his boss's prior conduct that if he did not sign the paper immediately . . . he would be fired. Plaintiff declares he was not given a copy of the paper[] and was not told that he was giving up his rights by signing it.

"The Court finds that the arbitration agreement was presented on a take-it-or-leave-it basis.

"In addition, plaintiff states he was not given a copy of the rules of the American Arbitration Association or told that a copy was available.

"Therefore, the Court concludes that there are enough factors present to establish procedural unconscionability.

"In addition, the Court also finds substantive unconscionability. The Court finds that this is an adhesion contract that imposes harsh or oppressive terms, because essentially the plaintiff waives his right to litigation, waives his right to discovery, waives his right to appeal, and it's one-sided. Only the plaintiff waives those rights. The defendant does not."

## III

## ISSUES NOT RAISED

We begin by emphasizing what is *not* at issue here.

A. *There Is No Dispute as to Whether Issues of Arbitrability Should Be Decided by the Arbitrator*.

Neither side is arguing that the arbitrator should decide whether the Arbitration Agreement is unconscionable. (See generally *Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1286-1288 [Fourth Dist., Div. Two].) Similarly, neither is arguing that the issue of individual versus class (or representative) arbitration (see part V, *post*) has been committed to the arbitrator. (See generally *Garden Fresh Restaurant Corporation v. Superior Court* (2014) 231 Cal.App.4th 678, 684-690.)

B. *There Is No Dispute as to the Applicability of the FAA*.

Likewise, neither side is disputing that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) applies.

"The FAA governs arbitration provisions in contracts that involve interstate commerce. [Citation.]" (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263.) It "preempts all state laws and rules that conflict with its provisions or its objective of enforcing arbitration agreements. [Citations.]" (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 968.)

"The party claiming that the contract involves interstate commerce and that the FAA preempts state law has the burden of proof. [Citations.]" (Knight, et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2014) Contractual Arbitration, ¶ 5:51.1.) While the interstate-commerce hurdle does not set a very high bar (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 212-213), normally it cannot be

surmounted without at least some evidence. (*Id.* at pp. 213-214.) Here, IHOP 754 did not introduce any *evidence* of an effect on interstate commerce. Arguably, we could take judicial notice that IHOP, the franchisor, operates in interstate commerce, but we cannot do so as to IHOP 754, the franchisee.

Nevertheless, in its motion to compel arbitration, IHOP 754 took the position that the FAA applied. In his opposition, Avelar did not dispute this; in fact, he affirmatively cited the FAA, though he argued that it did not preempt his right to bring a PAGA claim. Similarly, throughout his appellate brief, Avelar operates on the assumption that the FAA applies.

In our view, Avelar has forfeited any contention that the FAA does not apply. Indeed, he has virtually stipulated that it does apply. For all we know, it may be obvious to Avelar, from his knowledge of his former employer's business, that the relevant contract does involve interstate commerce, so that there is no reason to dispute the point. In any event, if Avelar had argued in the trial court that the FAA did not apply — or even that there was insufficient evidence that the FAA applied — IHOP 754 would have been on notice that the issue was disputed and it would have had the opportunity to attempt to introduce the necessary evidence. It would be simply unfair for us to raise this issue on our own motion at this late date.

We therefore accept the parties' assumption that the FAA applies.

IV

UNCONSCIONABILITY

IHOP 754 contends that the trial court erred by finding that the Arbitration Agreement was unconscionable.

A. *Standard of Review.*

"'"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" [Citation.]' [Citation.]" (*Network Capital Funding Corporation v. Papke*, *supra*, 230 Cal.App.4th at pp. 508-509.)

"The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability. [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.]" (*Pinnacle*

*Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, *supra*, 55 Cal.4th at p. 246.)

"Both procedural unconscionability and substantive unconscionability must be shown, but 'they need not be present in the same degree' and are evaluated on '"a sliding scale."' [Citation.] '[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, *supra*, 55 Cal.4th at p. 247.)

B. *Procedural Unconscionability*.

"As indicated, procedural unconscionability requires oppression or surprise. '"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form."' [Citation.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC*, *supra*, 55 Cal.4th at p. 247.)

Avelar's testimony afforded ample evidence of oppression. The Arbitration Agreement was a preprinted form contract. His supervisor told him that he had to sign it "for work"; he believed — and reasonably so — that, if he refused to sign it, he would be fired. (See *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 84.) He had no bargaining power and no opportunity to negotiate.

There was also ample evidence of surprise. While the Arbitration Agreement was brief and legible, that was little assistance, as Avelar was not given an opportunity to read

it. In addition, he was not told what was in it, and he was not given a copy afterward. (See *Wherry v. Award, Inc.* (2011) 192 Cal.App.4th 1242, 1247.)

Avelar argues that one reason why the Arbitration Agreement was procedurally unconscionable is that the rules of the American Arbitration Association (AAA) were not attached. (See *Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 797; *Trivedi v. Curexo Technology Corp.* (2010) 189 Cal.App.4th 387, 393; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406-1407; but see *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 690-691; *Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1470-1472.) We need not decide this point, because even if they had been attached, Avelar would not have had a chance to read them. Similarly, the recital in the Arbitration Agreement that they were available on the Internet or from IHOP 754 was useless, again because Avelar never had a chance to read it.

IHOP 754 argues "it is well settled that a party is bound to an agreement he signed, regardless of whether or not he has read it." However, "[t]h[is] general rule . . . applies only in the absence of '"overreaching"' [citation] or '"'imposition'"' [citation]." (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at p. 1291.) Thus, it is not determinative in unconscionability cases. "'Indeed, failure to read the contract helps 'establish actual surprise . . . .' [Citation.]" (*Ibid*.)

IHOP 754 also notes that, according to the Arbitration Agreement itself, Avelar "enter[ed] into this Agreement freely and voluntarily, and without coercion . . . ." But "[t]his [is] impermissible bootstrapping." (*Bruni v. Didion*, *supra*, 160 Cal.App.4th at

p. 1291.) If the Arbitration Agreement as a whole can be revoked as unconscionable, so can this recital.

IHOP 754 asks us to disregard Avelar's testimony as "litigation-motivated" and as contradicted by Miles's testimony (even though Miles would seem equally litigation-motivated). The trial court, however, explicitly relied on Avelar's testimony. Thus, it implicitly rejected Miles's. Under the substantial evidence test, "our power '"*begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support"' the finding. [Citation.] . . . We do not reweigh evidence or assess the credibility of witnesses . . . . [Citation.]" (*San Diego Gas & Electric Company v. Schmidt* (2014) 228 Cal.App.4th 1280, 1292.)

In sum, then, the trial court's finding that the Arbitration Agreement was procedurally unconscionable was supported by substantial evidence.

C. *Substantive Unconscionability*.

"Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided." (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1071.)[2]

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[2] Recently, in *Sanchez v. Valencia Holding Company LLC* (S199119), petn. for rev. granted Mar. 21, 2012, the Supreme Court called for further briefing on the following questions: "In formulating the standard for determining whether a contract or contract term is substantively unconscionable, this court has used a variety of terms, including 'unreasonably favorable' to one party [citation]; 'so one-sided as to shock the conscience' [citation]; 'unfairly one-sided' [citation]; 'overly harsh' [citation]; and 'unduly oppressive' [citation]. Should the court use only one of these formulations in describing the test for substantive unconscionability and, if so, which one? Are there any terms the court should *not* use? Is there a formulation not included among those above

*[footnote continued on next page]*

1. *The trial court's reasons for finding substantive unconscionability*.

The trial court found that the Arbitration Agreement was substantively unconscionable in specified respects: "[T]he plaintiff waives his right to litigation, waives his right to discovery, waives his right to appeal, and it's one-sided. Only the plaintiff waives those rights. The defendant does not." IHOP 754 argues that this finding was erroneous. Significantly, Avelar does not even attempt to defend this finding. He argues that the Arbitration Agreement was substantively unconscionable, but for entirely different reasons. (See part IV.C.2, *post*.)

The Arbitration Agreement did limit the right to discovery, but not in an unfair or one-sided fashion. It provided for "discovery . . . sufficient to permit each party to fully investigate and present its claims and defenses." We take judicial notice that the AAA's Employment Arbitration Rules and Procedures provide that "[t]he arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." (AAA, Employment Arbitration Rules & Mediation Procedures (eff. Nov. 1, 2009) rule

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*[footnote continued from previous page]*
that the court should use? What differences, if any, exist among these formulations either facially or as applied?" (2014 Sup. Ct. Mins. 278 (Feb. 19, 2014), available at <http://www.courts.ca.gov/documents/minutes/SFEB1914.PDF>, as of Jan. 21, 2015.)

In our view, the result in this case would be the same, regardless of which of these formulations is chosen.

9, available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362>, as of Jan. 21, 2015.)

"'California courts do not by any means require that an arbitration agreement permit "unfettered discovery." [Citation.] Parties may certainly "agree to something less than the full panoply of discovery provided in [a civil action]." [Citation.]' [Citation.] '[A]rbitration is meant to be a streamlined procedure. Limitations on discovery . . . [are] one of the ways streamlining is achieved.' [Citation.] [¶] [Avelar] has not made any showing how the limitation on discovery would prevent him from vindicating his rights in [t]his particular case." (*Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 404; see also *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 982-985.)

Likewise, the Arbitration Agreement did not limit the right to appeal unfairly or one-sidedly. "[T]he supposed inadequacy of judicial review of arbitration awards is not grounds for holding a claim inarbitrable, even when the arbitration involves a matter of public importance. [Citation.]" (*Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 312, fn. 1.) "Ensuring arbitral finality . . . requires that judicial intervention in the arbitration process be minimized. [Citations.] Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration." (*Moncharsh v. Heily & Blase* (1992) 3

Cal.4th 1, 10.) Here, while the Arbitration Agreement did effectively limit the right to appeal, it was not one-sided because the limitation was equally binding on both parties.

The trial court may have reasoned that the Arbitration Agreement was one-sided de facto, rather than de jure, because Avelar was more likely to sue IHOP 754 than vice versa. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, the California Supreme Court held that, to avoid substantive unconscionability, an employer-employee arbitration agreement must provide a "'modicum of bilaterality.'" (*Id*. at p. 117.) "[T]he doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." (*Id*. at p. 118.)

Avelar relies on *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, which held that an arbitration agreement that purported to impose the same terms on the employer and the employee was "one-sided anyway." (*Id*. at p. 1173.) It explained that "[t]he only claims realistically affected by an arbitration agreement between an employer and an employee are those claims employees bring against their employers." (*Id*. at p. 1174, fn. omitted.) It "conclude[d] that, under California law, a contract to arbitrate between an employer and an employee . . . raises a rebuttable presumption of substantive unconscionability." (*Ibid*.) This was all dicta, however, because the arbitration agreement in *Ingle* was *expressly* one-sided — it stated that it "applie[d] only to 'any and all employment-related legal disputes, controversies or claims of an Associate,' thereby limiting its coverage to claims brought by employees." (*Id*. at p. 1173.)

In our view, an employer could have many reasons to sue an employee (or former employee): for fraud, for conversion, for interfering with the employer's business relationship with other employees, for property damage, for misappropriation of trade secrets, for overpaid wages, for defamation, for a restraining order . . . the list is limited only by the imagination of lawyers. We have found no California case holding that there is a rebuttable presumption that an employer-employee arbitration agreement is substantively unconscionable. Thus, the *Ingle* dicta do not correctly state California law. To the contrary, it has been held that the necessary modicum of bilaterality is present as long as the arbitration agreement, by its terms, applies to claims by both the employer and the employee. (*Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231, 247.)

2. *Avelar's arguments for finding substantive unconscionability*.

Avelar claims that the Arbitration Agreement is substantively unconscionable in five respects.

Preliminarily, IHOP 754 responds that Avelar forfeited these claims by failing to raise them below. However, we have discretion to consider a new argument that raises a pure issue of law based on undisputed facts; this can include a new argument as to why an arbitration agreement is substantively unconscionable. (*Carmona v. Lincoln Millennium Car Wash, Inc.*, *supra*, 226 Cal.App.4th at p. 89, fn. 6; *D.C. v. Harvard-Westlake School* (2009) 176 Cal.App.4th 836, 868.)

a. *Power to modify*.

Avelar argues that IHOP 754 has the unilateral power to modify the Arbitration Agreement.

As mentioned, the Arbitration Agreement provides: "This Agreement can be modified or revoked only by a writing signed by employee and an executive officer of Ihop #754 that references this Agreement and specifically states the intent to modify or revoke this Agreement."

By its terms, this is bilateral, not one-sided, and therefore not substantively unconscionable. Avelar argues that, because he lacks bargaining power, if IHOP 754 were to demand a modification, he would be powerless to refuse. Even if so, this confuses substantive unconscionability with procedural unconscionability. As already discussed, the trial court correctly found that the Arbitration Agreement was procedurally unconscionable due to Avelar's lack of bargaining power. It would be double-counting to treat this as a form of substantive unconscionability. Otherwise, many (if not most) "at-will" employment agreements would also be substantively unconscionable.

In *Serpa v. California Surety Investigations, Inc.* (2013) 215 Cal.App.4th 695, the arbitration agreement expressly allowed the employer, but not the employee, to modify it. The appellate court held that this was not substantively unconscionable, because the employer's expressly unilateral right to modify the agreement was limited by the implied covenant of good faith and fair dealing. (*Id*. at pp. 705-708.) A fortiori, the expressly bilateral modification provision here is not unconscionable.

b. *Good-faith negotiation requirement*.

Avelar also argues that the requirement that the parties attempt "good faith negotiation" before demanding arbitration is substantively unconscionable.

Employment agreements that require the employee to engage in informal dispute resolution with the employer — but not vice versa — have been held to be substantively unconscionable. (*Carmona v. Lincoln Millennium Car Wash, Inc., supra,* 226 Cal.App.4th at p. 89; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1282-1283.) Here, by contrast, the Arbitration Agreement requires both sides to attempt good-faith negotiation. This is not one-sided or unfair.

Avelar also argues that the good-faith negotiation provision is too vague to be enforced. He does not explain how it is supposedly vague. In our view, its meaning is sufficiently clear, particularly by analogy to the numerous statutory requirements that the parties to a dispute must "meet and confer." (E.g., Bus. & Prof. Code, § 2282.5, subd. (c) [medical staff and hospital governing board]; Code Civ. Proc., § 2016.040 [parties to a discovery motion]; Gov. Code, § 3505 [governing body of a public agency and representatives of recognized employee organizations].)

c. *60-day period for initiating arbitration*.

As mentioned, the Arbitration Agreement provided that "[o]nce either party determines that efforts at good faith negotiation have failed, *within 60 days of notifying the other party of this determination*, either party may initiate arbitration proceedings . . . ." (Italics added.)

Avelar argues that this deprives him of the full applicable limitations period. However, the Arbitration Agreement does not specify how soon Avelar must request good-faith negotiation. Thus, for example, assuming his cause of action for minimum wages and overtime was subject to a three-year statute of limitations (see Code Civ. Proc., § 338, subd. (a)), he could lie "doggo" for most of the three years, as long as near the end, he attempted good-faith negotiation.

Avelar relies on *Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107. There, however, the arbitration agreement provided that the employee had to assert any claim within six months *after the claim arose*. (*Id*. at p. 117.) The court held that "[t]h[is] shortened limitations period . . . is unconscionable and insufficient to protect . . . employees' right to vindicate their statutory rights." (*Id*. at pp. 117-118.) Our case is distinguishable because, as already discussed, the 60-day period does not run from the accrual date.

Finally, we also note that the 60-day period applied equally to IHOP 754 and to Avelar. For this reason, too, this provision was not substantively unconscionable.

d. *Lack of full disclosure*.

Avelar argues that the failure to disclose to him the full effect of the Arbitration Agreement — e.g., that he was giving up the right to discovery, the right to a jury trial, and the right to appeal — was substantively unconscionable.

Once again (see part IV.C.2.a, *ante*), this confuses procedural unconscionability with substantive unconscionability. Treating this nondisclosure as substantive unconscionability would be double-counting.

e. *Attorney fees*.

Avelar argues that the Arbitration Agreement deprives him of his statutory right to attorney fees.

Avelar's complaint included causes of action for failure to pay minimum wages and overtime, failure to provide accurate wage statements, and failure to reimburse expenses. On each of these causes of action, a prevailing employee is statutorily entitled to attorney fees. (Lab. Code, §§ 226, subd. (e)(1) [wage statements], 1194, subd. (a) [minimum wages and overtime], 2802, subd. (c) [expense reimbursement].)[3] On at least one of them, the employee's right to attorney fees is not waivable. (Lab. Code, § 2804 [expense reimbursement]; see also Civ. Code, § 3513.)

As mentioned, however, the Arbitration Agreement provided, "Each party will bear their own attorney's fees and costs." We agree that, to the extent that this purports to waive Avelar's right to nonwaivable attorney fees, it is substantively unconscionable — indeed, it is flat-out illegal. (Cf. *Samaniego v. Empire Today, LLC* (2012) 205

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[3] Avelar also had a right to attorney fees if he prevailed on his cause of action under PAGA. (Lab. Code, § 2699, subd. (g)(1).) However, as we will hold in part V.B, *post*, he could not be compelled to arbitrate his PAGA claim at all. Thus, we discuss his argument based on the statutory right to attorney fees only as it applies to his non-PAGA claims.

Cal.App.4th 1138, 1147 [attorney fee shifting provision was unconscionable, even though it was also illegal and thus unenforceable].)

"A trial court has the discretion to refuse to enforce an agreement as a whole if it is permeated by the unconscionability. [Citation.] 'The overarching inquiry is whether "'the interests of justice . . . would be furthered'" by severance.' [Citation.] If the central purpose of a contractual provision, such as an arbitration agreement, is tainted with illegality, then the provision as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contractual provision, and can be severed or restricted from the rest, then severance is appropriate. [Citation.]" (*Carmona v. Lincoln Millennium Car Wash, Inc.*, *supra*, 226 Cal.App.4th at p. 90.)

Here, there was only a single unconscionable provision. And even that provision will not be unconscionable in operation, unless Avelar actually prevails on a cause of action on which he has an unwaivable statutory right to attorney fees. "Where, as here, only one provision of an agreement is found to be unconscionable and that provision can easily be severed without affecting the remainder of the agreement, the proper course is to do so." (*Dotson v. Amgen, Inc.*, *supra*, 181 Cal.App.4th at p. 985; see *Serpa v. California Surety Investigations, Inc.*, *supra*, 215 Cal.App.4th at pp. 709-710 [unconscionable attorney fee provision could be severed].)

Accordingly, the trial court should have severed the attorney fee provision and declared it unenforceable to the extent that it conflicted with Avelar's statutory rights to

attorney fees. However, the trial court erred by ruling that the Arbitration Agreement as a whole was unconscionable.

V

CLASS AND REPRESENTATIVE CLAIMS

IHOP 754 contends that Avelar's class claims are not subject to arbitration. It further contends that his PAGA cause of action is subject to arbitration, but only on an individual basis.

Unhelpfully, Avelar responds that these contentions are "moot," supposedly because the trial court refused to compel arbitration at all and thus did not reach issues of class or representative arbitration versus individual arbitration.

Avelar's reasoning seems to be that *if* the trial court had compelled arbitration of individual claims, but not of class or representative claims, *then* IHOP 754 could not appeal; it could seek review only by writ. (See *Reyes v. Macy's, Inc.* (2011) 202 Cal.App.4th 1119, 1122-1123.) However, that is not what actually happened. Rather, the trial court refused to compel arbitration of any of Avelar's claims. That was an appealable order. If we hold that it was erroneous, we have the power to decide what order it should have rendered instead. (Code Civ. Proc., § 906 ["the reviewing court . . . may affirm, reverse or modify any judgment or order appealed from *and may direct the proper judgment or order to be entered* . . . ," italics added.].) This power "'[is] to be liberally construed to the end that a cause may be disposed of on a single appeal.'" (*Harlow v. Carleson* (1976) 16 Cal.3d 731, 738.)

Avelar also states, "[S]hould the court consider this an issue on appeal, Avelar respectfully requests that the Court allow further briefing in this respect." We decline to do so. Ordinarily, a respondent is allowed to file one and only one brief. (Cal. Rules of Court, rule 8.200(a)(2).) Further briefing is allowed only for good cause. (See Cal. Rules of Court, rule 8.200(a)(4).) A respondent is not entitled to pick and choose among the appellant's arguments, to forgo responding to some, and then to demand another round of briefing if the court finds those arguments potentially meritorious. Otherwise, the briefing would never be closed.

Accordingly, we proceed to consider whether Avelar's class and representative claims were subject to arbitration.

A. *Class Claims.*

The Arbitration Agreement does not expressly address class actions one way or the other.

The leading case on whether class arbitration is authorized under these circumstances is *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662. There, the relevant arbitration agreement was silent with respect to class arbitration. (*Id*. at pp. 667-668.) Nevertheless, a panel of arbitrators ruled that the arbitration agreement allowed for class arbitration. (*Id*. at p. 669.)

The United States Supreme Court held that this exceeded the arbitrators' powers. (See *Stolt-Nielsen S.A. v. AnimalFeeds International Corp., supra,* 559 U.S. at pp. 671-672.) "An implicit agreement to authorize class-action arbitration . . . is not a term that

the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." (*Id.* at p. 685.) Rather, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." (*Id*. at p. 684.)

Although *Stolt-Nielsen* was decided under the FAA, it is consistent with California law regarding the interpretation of arbitration agreements. "'California courts often look to federal law when deciding arbitration issues under state law.' [Citation.]" (*Tiri v. Lucky Chances, Inc.*, *supra*, 226 Cal.App.4th at p. 240.) "Under federal as well as California law, there is a strong public policy favoring arbitration, but an accompanying foundational precept that claims should be arbitrated only to the extent the parties have agreed. [Citation.]" (*Ajamian v. CantorCO2e, L.P.*, *supra*, 203 Cal.App.4th at pp. 780-781.) Moreover, under California law, "[c]ourts may find an implied term in a contract only under 'limited circumstances' on grounds of '"obvious necessity"' 'where the term is "indispensable to effectuate the expressed intention of the parties."' [Citation.]" (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 361-362.)

Here, the Arbitration Agreement provided, "Ihop #754 and this employee hereby agree that any controversy, dispute, or claim arising out of or relating to employee's employment with Ihop #754 will first attempt to settle [*sic*] through good faith negotiation. If the dispute cannot be settled through negotiation, arbitration will be administered . . . ." A class claim does not "aris[e] out of or relat[e] to *[the] employee's* employment . . . ." (*Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th

1115, 1129-1130 [provision for arbitration of "claims, disputes, and controversies 'between [employee] and [employer]" does not encompass class claims].) Moreover, Avelar would not have the authority to settle a claim on behalf of a class.

We recognize that in *Gentry v. Superior Court* (2007) 42 Cal.4th 443, the California Supreme Court held that, even when an employer-employee arbitration agreement includes an *express* class action waiver, the employer can still be compelled to participate in class arbitration of employees' unwaivable statutory claims under certain circumstances. (*Id*. at pp. 453-466.) Logically, *Gentry* would also apply in a case like this, where the parties simply did not provide for class arbitration. (See *Truly Nolen of America v. Superior Court* (2012) 208 Cal.App.4th 487, 506.) Recently, however, in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, the California Supreme Court held that the FAA preempts *Gentry*. (*Iskanian*, *supra*, at pp. 362-366.) As discussed in part III.B, *ante*, Avelar has forfeited any contention that the FAA does not apply.

We therefore conclude that the Arbitration Agreement did not provide for class arbitration.

B. *Claim under the Private Attorneys General Act*.

"In PAGA, the Legislature created an enforcement mechanism for aggrieved employees to file representative actions to recover penalties in cases in which there is no private cause of action as an alternative to enforcement by the Labor Commissioner.

[Citations.]" (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 650.)

"[A]n 'aggrieved employee' may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. [Citation.] Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.' [Citation.]" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 980-981, fn. omitted.) Thus, a PAGA action is a representative action, but not a class action. (*Id*. at p. 977.)

As a matter of state law, an agreement not to bring a PAGA action is illegal and unenforceable. (*Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal.App.4th 1277, 1284, 1303.) IHOP 754 therefore argues that the FAA preempts this aspect of state law as applied to an arbitration agreement, so that a PAGA waiver in an arbitration agreement is fully enforceable.

After this appeal was fully briefed, however, the California Supreme Court issued its opinion in *Iskanian v. CLS Transp. Los Angeles, LLC*, *supra*, 59 Cal.4th 348. There, it confirmed that "an employee's right to bring a PAGA action is unwaivable," and thus "an agreement by employees to waive their right to bring a PAGA action . . . is against public policy and may not be enforced. [Citation.]" (*Id.* at p. 383.) It also held that "the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract." (*Id*. at p. 359; see also *id*. at pp. 384-389.)

Accordingly, Avelar is not required to arbitrate his PAGA claim; he is entitled to litigate it in a judicial forum.

VI

DISPOSITION

The order denying the petition to compel arbitration is reversed.

In *Iskanian v. CLS Transp. Los Angeles, LLC, supra,* 59 Cal.4th 348, the California Supreme Court held — as we do here — that an employee could be required to arbitrate all of his claims against his employer, except for his PAGA claim. (*Id*. at pp. 360-361.) Thus, we adapt the disposition from *Iskanian,* as follows:

"[Avelar] must proceed with bilateral arbitration on his individual damages claims, and [IHOP 754] must answer the representative PAGA claims in some forum. . . .

"This raises a number of questions: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed pursuant to Code of Civil Procedure section 1281.2? [Citation.] The parties have not addressed these questions and may do so on remand." (*Iskanian v. CLS Transp. Los Angeles, LLC, supra,* 59 Cal.4th at pp. 391-392.)

Moreover, because we are holding that Avelar's class claims were not subject to arbitration, on remand, Avelar may ask the trial court to allow discovery for the purpose of identifying a new class representative. (See generally *Pirjada v. Superior Court*

(2011) 201 Cal.App.4th 1074, 1083-1084 and cases cited.) We express no opinion on how the trial court should rule.

In the interests of justice, each side shall bear its own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.